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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

THOMAS W. BRADSHAW, JR., Secretary of the North Carolina Department of Transportation,

Petitioner,

v.

MARY G. P. HALL and LAWRENCE C. ROUSH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RUFUS L. EDMISTEN
Attorney General of North Carolina

JANE RANKIN THOMPSON
Assistant Attorney General

Post Office Box 25201
Raleigh, North Carolina 27611
Telephone (919) 733-4185

Attorney for Petitioner

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-vs-

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QUESTION PRESENTED

HAS THE STATE OF NORTH CAROLINA VIOLATED THE PROHIBITION AGAINST ESTABLISHMENT OF RELIGION CONTAINED IN THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BY PUBLISHING ANNUALLY AN OFFICIAL NORTH CAROLINA HIGHWAY MAP ON WHICH IS PRINTED A "MOTORIST'S PRAYER."?

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The opinion of the Fourth Circuit Court of Appeals (No. 79-1274) is unofficially reported in 49 Law Week 2210 (Sept. 30, 1980) and appears in the Appendix hereto. The opinion of the United States District Court for the Eastern District of North Carolina is No. 75-14-CIV-5. Petitioner has been informed by the District Court Clerk's office that this opinion was published in October 1980, but Petitioner has been unable to locate that official report.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on September 10, 1980. This petition is being filed within sixty (60) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Sec.1254(1).

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION:

Amendment I:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Each year the North Carolina Department of Transportation and Highway Safety publishes and distributes free of charge to the motoring public an official Highway Map. The Department of Transportation and Highway Safety is charged with building and maintaining a statewide system of roads and highways and with promoting highway safety throughout North Carolina. North Carolina General Statutes 143B-346 and 143B-360.

One side of the map is simply a map of the North Carolina roads and highways. The other side carries a photograph of and message from the Governor, scenic pictures of North Carolina and the "Motorist's Prayer", which has been on the map for more than ten years and reads as follows:

> "Our heavenly Father, we ask
> this day a particular blessing
> as we take the wheel of our car.
> Grant us safe passage through

all the perils of travel;
shelter those who accompany
us and protect us from harm
by Thy mercy; steady our hands
and quicken our eye that we
may never take another's life;
guide us to our destination
safely, confident in the know-
ledge that Thy blessings go
with us through darkness and
light...sunshine and shower...
forever and ever. Amen."

Respondents, individually as citizens of North Carolina, and as representatives of all persons in North Carolina who object to and oppose inclusion of the "Motorist's Prayer" on the map, brought suit in 1975 in the Eastern District of North Carolina seeking a permanent injunction restraining and enjoining the Department of Transportation and Highway Safety from publishing and publicly distributing the Official Highway Map containing the "Motorist's Prayer". Respondents contended that the "Motorist's Prayer" is in violation of the prohibition against the establishment of religion contained in the First Amend-

ment to the United States Constitution and claimed jurisdiction for their action under 42 U.S.C. Sec. 1983, 28 U.S.C. Sec. 1331(a), 28 U.S.C. Sec. 1343(3)(4) and 28 U.S.C. 2201, et. seq. The facts involved in this case were not in controversy and the parties filed cross motions for summary judgment. Judge Franklin Dupree of the Eastern District of North Carolina filed a Memorandum of Decision on March 23, 1979, holding that the "Motorist's Prayer" passed constitutional muster under the three-part test enunciated by this Court in Committee for Public Education and Religious Liberties v. Nyquist, 413 U.S. 756, 37 L.Ed. 2d 948, 93 S.Ct. 2955 (1973). Judge Dupree specifically held that the prayer reflected a clearly secular legislative purpose, did not have the primary effect of advancing or inhibiting religion and did not excessively entangle the State of North Carolina

in religion. From Judge Dupree's judgment for the Petitioner, denying Respondents' motion for summary judgment and dismissing the action, Respondents appealed to the United States Court of Appeals for the Fourth Circuit. In a decision filed on September 10, 1980, the Court, speaking through Judge Dickson Phillips, found the presence of the "Motorist's Prayer" on the map to be an impermissible government sponsorship of religion with divisive political potential in violation of the Establishment Clause and remanded the case to the district court with instructions to permanently enjoin the Petitioner from including the prayer on future editions of the official map.

REASONS FOR ALLOWING THE WRIT

The decision of the Fourth Circuit Court of Appeals presents an important question of federal law which has not been,

but should be settled by this Court.

The First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, commands that a state "shall make no law respecting an establishment of religion." In Everson v. Board of Education, 330 U. S. 1, 91 L.Ed. 711, 67 S.Ct. 504 (1947), this Court elaborated upon the breadth of The Establishment Clause:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they

> may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State'." 303 U.S., at 15, 91 L.Ed. at 723, 67 S.Ct. at 511.

In decisions since Everson, this Court has recognized that complete separation of church and state is not possible nor desirable. As stated by Chief Justice Burger, "(O)ur prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense....Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall', is a blurred indistinct, and variable barrier depending on all the circumstances of a particular relationship."

Lemon v. Kurtzman, 403 U.S. 602, 614, 29 L.Ed. 2d 745, 756, 91 S.Ct. 2105, 2112 (1971). As a result, this Court has acknowledged that flexibility is needed to insure that the maintenance of the general public welfare will not be lost in a blind desire to eliminate all state contact with religion -- no matter how slight.

Mr. Justice Harlan expressed this idea when he stated in his dissent in Sherbert v. Verner, 374 U.S. 398, 10 L.Ed. 2d 965, 83 S.Ct. 1790, (1963), "The constitutional obligation of 'neutrality'...is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation." Id., at 422, 10 L.Ed. 2d at 981. More recently in Meek v. Pittenger, 421 U.S. 349, 44 L.Ed. 2d 217, 95 S.Ct. 1753 (1975), this Court held that "not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the

Constitution." Id., at 359, 44 L.Ed. 2d at 228.

As the Petitioner understands this Court's decisions, any state action challenged on Establishment Clause grounds must be carefully examined to determine whether such action furthers any of the evils against which that clause protects." Primary among those evils have been 'sponsorship, financial support and active involvement of the sovereign in religious activity....'" Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 772, 37 L.Ed. 2d 948, 962, 93 S.Ct. 2955, 2965 (1973). Nyquist sets out the analytical framework to be used in Establishment Clause cases and requires that

> "to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose,... second, must have a primary effect that

> neither advances nor inhibits religion,...and, third, must avoid excessive government entanglement with religion." Id. at 733 (citations omitted).

The cases of Everson v. Board of Education, supra, and McGowan v. Maryland, 366 U.S. 420, 6 L.Ed. 2d 393, 81 S.Ct. 1101 (1961) represent instances in which this Court has defined the constitutional relationship between religion and government with an eye toward serving the public welfare. In Everson, New Jersey legislation which called for reimbursement to all parents of school-age children for bus fares paid in transporting their children to school was held not to encourage the establishment of religion, although it could admittedly have encouraged an increased enrollment in parochial schools. This remote futherance of religion was found to be outweighed and justified by the purpose and effect of the statute,

helping parents to get their children to school safely and expeditiously regardless of their religion, a proper public welfare function. In McGowan, Sunday Closing Laws were upheld because a close examination of the history of such laws revealed that they had only a remote and incidental effect advantageous to religious institutions and that the purpose and effect of these statutes was to set aside Sunday as a day of rest and recreation. Petitioner believes this holding is significant, in view of the fact that the Maryland Code dealing with Sunday Closing was entitled "Sabbath Breaking", that several of the exempted activities could be conducted only during the afternoon or late evening, and that certain localities did not permit the exempted Sunday activities to be conducted within one hundred yards of any church where religious services were being held. 366 U.S. at 445, 6 L.Ed. 2d at 410.

Petitioner can find no decision of this Court directly on point to the facts in this case. This court's decisions in the school prayer cases are distinguishable from the case at bar and should not control. In Engel v. Vitale, 370 U.S. 421, 8 L.Ed. 2d 601, 82 S.Ct. 1261 (1962), a brief denominationally neutral prayer was required to be said aloud by each class in the presence of a teacher at the beginning of each school day. Pupils who wished to do so could remain silent or be excused from the room. This Court found that this practice of reciting the Regent's Prayer violated the Establishment Clause, holding specifically that "it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government." Id., at 425, 8 L.Ed. 2d at 605. Subsequently, in Abington

School District v. Schempp, 374 U.S. 203, 10 L.Ed. 2d 844, 83 S.Ct. 1560 (1973), this Court considered whether Pennsylvania and Baltimore could require the reading, without comment, of verses from the Bible at the opening of each school day and the recitation of the Lord's Prayer by the students in unison. Again, this Court held that these laws requiring religious exercises were in violation of the First Amendment.

Petitioner would strongly contend that the inclusion of the "Motorist's Prayer" on the state highway map does not represent a state-mandated religious exercise such as those condemned in Engel v. Vitale, supra, and Abington School District v. Schempp, supra. While Petitioner has been unable to find other state or federal cases directly on point, several types of cases involving similar state practices have addressed

similar constitutional challenges.

INVOCATION CASES

In Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979), the Court affirmed the District Court's holding that a resolution of The County Board of St. Louis County, Minnesota, providing that each county board meeting would be preceded by a prayer given by an invited local clergyman, did not violate the First Amendment. In so holding the Court considered the principal Establishment Clause decisions of this Court, including Abington School District v. Schempp, supra, and Engel v. Vitale, supra, and specifically found that the concerns behind the decision in Engel v. Vitale were not present in the case before them because the government had not written a prayer and directed its recitation. The Court found that the invocation practice reflected a clearly secular purpose of establishing

a solemn atmosphere and serious tone for the Board meetings and that the prayers did not have the primary effect of advancing or inhibiting religion. In this regard, the court recognized, "(i)t is no doubt true that some who hear the prayers will treat those moments as ones for religious reflection and thought. However, we are satisfied that a primary effect of this activity will simply be the accomplishment of the Board's purpose of establishing order and a solemn tone for the meeting." 598 F.2d 1110, 1114. Finally, the Court held that the invocation practice did not excessively entangle government with religion and addressed the plaintiff's contention that the invocation practice carried the potential of dividing people in the political arena along religious lines as follows:

> "The present litigation and the earlier attempts to seek

> recission of the practice demonstrate the political divisiveness of the invocations. We appreciate the convictions of those who feel that the prayers may impinge on their rights. The use of a public facility for a religious practice, the potential sectarian influence on public issues, and the stamp of apparent approval given to the religious groups represented, all are matters of legitimate concern to some citizens. However, we do not see this divisive potential as being of the same caliber as the annual appropriation of public funds anticipated but forbidden in Lemon v. Kurtzman [403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745 (1971)]. On the basis of the complaint and the stipulated facts we do not find an excessive entanglement of government and religion." 598 F.2d 1110, 1114.

Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968), involved the practice of opening town meetings with an invocation by a local minister. The Court recognized that some citizens might view the invocation as purely ceremonial while others would consider it a religious practice. Nevertheless, the Court held that "however any individual voter may describe the

practice, it is not, on the facts of this case, an establishment of religion proscribed by the establishment clause of the First Amendment in any pragmatic, meaningful and realistic sense of that clause." 241 A.2d at 801. In Colo v. Treasurer & Receiver Gen., 392 N.E. 2d 1195 (Mass. 1979), the Supreme Judicial Court of Massachusetts held that a statute authorizing expenditure of public monies to pay salaries of legislative chaplains was constitutional under the First Amendment to the United States Constitution and the Articles of Amendment to the Massachusetts Constitution. These chaplains for the Massachusetts House and Senate opened each daily session with an invocation, the purpose of which the court recognized to be "the maintenance of long tradition and the continuation of a ritual which prompts legislators to reflect on the gravity and solemnity of their responsibilities and of the

acts they are about to perform" 392 N.E. 2d at 1200. The Court further held that although opening prayers have a religious nature, they did not have the primary effect of advancing religion. "In this respect, such invocations are easily distinguishable from the practice of daily prayer or bible reading in the schools. There the state, by incorporating religious exercises into the context of a compulsory school day, lends at least implicit support to the notion that children should be indoctrinated to accept religion. The purpose of a school is to teach impressionable children, many of whom, because of their ages, cannot be expected to comprehend that school-sponsored prayers are not necessarily 'lessons' to be learned like other aspects of the school program" Id., at 1200.

In addition to these decisions involving

invocations at governmental gatherings, the offering of prayers and invocations at public high school graduations has been approved in Weist v. Mt. Lebanon School District, 457 Pa. 166, 320 A.2d 362 (1974), cert. denied 419 U.S. 967; 42 L.Ed. 2d 183, 95 S.Ct. 231 (1974); Grossberg v. Deusebio, 380 F.Supp. 285 (E.D.Va. 1974); Wood v. Mt. Lebanon Township School District, 342 F.Supp. 1293 (W.D.Pa. 1972), all of which found the practice of offering invocations did not "tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent." Abington School District v. Schempp, supra, 374 U.S. at 236, 10 L.Ed. 2d at 866 (concurring opinion of Justice Brennan). Moreover, the invocation to the Deity found on all United States currency and coins and in our national motto has been held

not to violate the Establishment Clause. Aronow v. United States, 432 F.2d 242 (9th Cir. 1970).

RELIGIOUS SYMBOL CASES

The federal courts and several states have been confronted with a variety of circumstances in which ordinary religious symbols have been displayed on public property for a secular purpose. In Lowe v. City of Eugene, 254 Or. 518, 451 P.2d 117, 459 P.2d 222,463 P.2d 360 (1969), cert denied, 397 U.S. 1042, 90 S.Ct. 1366, 25 L.Ed. 2d 654 (1970), the Supreme Court of Oregon held that the City of Eugene could not constitutionally issue building permits for the erection of a cross on city park property by a private citizen. The cross was lighted during the Christmas season and Easter week and the Court found the highly visible display (the park was atop Skinner's Butte) of the cross on city

land represented a governmental endorsement of the religious beliefs associated with the Latin cross. Seven years later, the Supreme Court of Oregon again was faced with the same cross on Skinner's Butte Municipal Park. Eugene Sand & Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d, 338 (1976), cert. denied, 434 U.S. 876, 54 L.Ed. 2d 155, 98 S.Ct. 226 (1977). The Court again recognized that the Latin cross is a religious symbol but held the controlling issue to be whether the display of the cross on city-owned property under the circumstances at the time of the trial of this second case satisfied the three-part test of this Court in Committee for Public Education v, Nyquist, supra. The Court went on to hold that changes in the circumstances under which the cross was displayed passed constitutional muster. These changes included sponsorship by the

American Legion, whose purpose was to display the cross as a memorial to all war veterans, a designation of this purpose on the cross, lighting of the cross on patriotic occasions and a city charter amendment specifically stating that the purpose of the display was as a war memorial.

In Anderson v. Salt Lake City Corporation, 475 F.2d 29 (10th Cir. 1973), cert. denied 414 U.S. 879, 33 L.Ed. 2d 124, 94 S.Ct. 50 (1973), the Boards of Commissioners of Salt Lake City and Salt Lake County informally permitted the Fraternal Order of Eagles to erect on city-county courthouse grounds a permanent 345-foot granite monolith inscribed with a version of the Ten Commandments and certain other symbols representing the All Seeing Eye of God, the Star of David, the Order of Eagles, letters of the Hebraic alphabet, and Christ

or peace. The city and county also provided illumination of the monolith. The monolith was displayed as part of the fraternal order's youth guidance program, one purpose of which was to "...to inspire all who pause to view them, with renewed respect for the law of God, which is our greatest strength against forces that threaten our way of life." Id. at 30. The Tenth Circuit refused to require removal of the monument, holding that it was primarily secular and not religious in character and did not have a purpose or effect tending to establish religious belief.

In Paul v. Dade County, 202 So. 2d 833 (Fla. App. 1967), cert. denied, 207 So. 2d 690 (Fla. 1967), cert. denied 390 U.S. 1041, 20 L.Ed. 2d 304, 88 S.Ct. 1636 (1968), the challenged practice was a temporary string of lights in the form of

a cross on the outside of the county courthouse during the December Christmas season. Dade County contended that the cross was simply meant as a Christmas decoration to attract shoppers to the downtown Miami shopping area. The Court held that the cross did not "amount to a religious activity, controlled, supported or influenced by the government as was found to exist in Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed. 2d 601 (1962)." Id. at 835. In a more recent case, the Supreme Court of California held on state constitutional grounds that a lighted, single-barred cross could not be displayed on city hall to honor Christmas and Easter Sundays. Fox v. City of Los Angeles, 150 Cal. Rptr. 867, 587 P.2d 663 (1978). The Supreme Court of Oklahoma, also on state constitutional grounds, allowed Oklahoma City to maintain a 50-foot high Latin

cross at the municipal fairgrounds, holding that the cross was displayed in a "secular environment" and displayed sectarian ideas only in the "most evanescent" manner. Meyer v. Oklahoma City, 496 P.2d 789 (Okl. 1972), cert. denied, 409 U.S. 980, 93 S.Ct. 314, 34 L.Ed. 2d 244 (1972).

It is the position of the Petitioner that this Court's Establishment Clause decisions do not settle the issue presented in this case and that other federal and state courts have decided issues similar to those presented here with less than consistent results. The Petitioner further contends that the Fourth Circuit Court of Appeals incorrectly applied the Nyquist tests to the facts of this case and that the presence of the "Motorist's Prayer" on the state highway map is not constitutionally proscribed.

APPLICATION OF NYQUIST TESTS

The stated purpose of the prayer, as found by the District Court was to promote highway safety and increase driver awareness of the need for safety on North Carolina's roads and highways. This purpose was before the District Court in an affidavit by a Department of Transportation employee in charge of editing the highway map. The Court of Appeals' decision holds that "a prayer, however, is undeniably religious and has, by its nature, both a religious purpose and effect. While we agree that the prayer may foster the state's legitimate concern for safety of motorists, the state cannot escape the proscriptions of the Establishment Clause merely by identifying a beneficial secular purpose. The inquiry goes beyond this." (App. at page 9) The Court of Appeals' opinion thus accepts the stated purpose of

the "Motorist's Prayer" as the clearly secular one of promoting highway safety but finds controlling the inherently religious nature of a prayer.

Concerning the "primary effect" of the "Motorist's Prayer", the District Court held that the prayer did "not serve to disseminate religious ideas, but is intended to instill in the minds of readers the inherent dangers of automobile travel and the need for constant alertness; due to its limited audience and distribution, the prayer does not advance or inhibit religion within the meaning of McGowen v. Maryland, 366 U.S. 420 (1961)..." (App. at pg.29). The Court of Appeals' decision holds simply that "a prayer, because it is religious, does advance religion...." (App. at pg.12). The "Motorist's Prayer" has appeared on all editions of the North Carolina official highway map since 1964

and at the present time is located on the side of the map opposite the actual road map and below the Governor's "Welcome to North Carolina", a listing of the members of the North Carolina Board of Transportation and the following paragraph:

> "Prepared by the North Carolina Department of Transportation and the Travel and Tourism Section of the Department of Commerce, this map is furnished free of charge and is not to be used for promotional, commercial or political purposes. This map is available at most public libraries, state welcome centers, driver's licensing offices and other state transportation offices."

Initially, Petitioner would contend that a road map is hardly a medium through which religious ideas may be successfully transmitted. Secondly, the Prayer's entire thrust is one of reminding the reader of the need for safe driving habits rather than the dissemination of religious tenets. Moreover, while the element of compulsion

is not essential to a violation of the Establishment Clause, Engel v. Vitale, supra, the lack of compulsion to recite or even read this prayer as part of a captive audience is relevant to the issue of the Prayer's primary effect. The Petitioner would submit that the "Motorist's Prayer" can have no more than a remote and incidental effect advantageous to religious institutions.

"In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." Lemon v. Kurtzman, supra, at 615, 29 L.Ed. 2d at 757. The Petitioner would contend that the "Motorist's Prayer" is at most of only indirect or incidental benefit to any religious institution,

especially in view of the Prayer's non-denominational character, that no specific religious institution is aided by the Prayer and that no intimate relationship between Church and State has resulted from the publication of this Prayer, thereby entangling the State in details of religious administration. Neither is another type of entanglement suggested by Chief Justice Burger in Lemon v. Kurtzman, supra, at 622, that of "divisive political potential" of the challenged State action, present in this case especially in view of the fact that the propriety of the Prayer was not questioned for over ten years after its appearance on the State highway map. The history of the Prayer on the map does not support the Court of Appeals' concern over "political division along religious lines." (App. at p.14) Again, the religious nature of the Prayer, in that Court's

opinion, leads inherently to the threat of political divisiveness even though no such threat has materialized.

In its discussion of the entanglement issue, the Court of Appeals forcefully holds that no "officially composed prayer" can pass muster under the Establishment Clause and that judges should not be called on to make distinctions concerning the purpose, primary effect and degree of entanglement involved in various types of prayers such as the one before this Court. (App. at pg. 16) This Court responded to this line of reasoning in Walz v. Tax Commission, 397 U.S. 664, 25 L.Ed. 2d 697, 90 S.Ct. 1409 (1970):

> "The argument that making 'fine distinctions' between what is and what is not absolute under the Constitution is to render us a government of men, not laws, gives too little weight to the fact that it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constituion.... Determining what acts of govern-

> ment tend to establish or interfere with religion falls well within what courts have long been called upon to do in sensitive areas." Id. at 679, 25 L.Ed. 2d at 707.

At the heart of this case is the absolutist position of the Court of Appeals that the state may not use a prayer to promote any secular purpose, that the means to a secular end can have no religious nature whatever. This position is in clear conflict with cases such as Eugene Sand & Gravel, Inc., v. City of Eugene, supra, where a number of state cases were cited as authority for the proposition that a religious symbol such as a cross or the Ten Commandments could constitutionally be displayed or used for a secular purpose and would not be found to necessarily have the primary effect of advancing or inhibiting religion. 558 P.2d at 346. Further, the offering of invocations, which are clearly prayers, at government and other public

meetings has been held not to violate the Establishment Clause where the Nyquist tests are met. Bogen v. Doty, supra. In a recent opinion, Florey v. Sioux Falls School District 49-5, 619 F.2d 1311 (8th Cir. 1980), a school board policy was upheld permitting observance of holidays having both a religious and secular basis for the purpose of expanding the students' knowledge of the role our religious heritage has played in the social, cultural and historical development of civilization. The Court held,

> "...The Constitution does not necessarily forbid the use of materials that have a 'religious basis.' Government involvement in an activity of unquestionably religious origin does not contravene the Establishment Clause if its 'present purpose and effect' is secular. McGowan v. Maryland, 366 U.S. 420, 445, 81 S.Ct. 1101, 1115, 6 L.Ed. 2d 393 (1961)." Id. at 1315.

The Petitioner submits that constitutionality of the "Motorist's Prayer" represents an important question of federal

law which has not been addressed by this Court and concerning which a sizeable body of state and federal law has developed. Petitioner further submits that the state of North Carolina through its Department of Transportation has not violated the prohibition against establishment religion contained in the First Amendment to the United States Constitution by printing the "Motorist's Prayer" on the official highway map.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

This the 7th day of November, 1980.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Jane Rankin Thompson
Assistant Attorney General
N. C. Department of Justice
P. O. Box 25201
Raleigh, North Carolina 27611
Telephone: (919) 733-3316

Counsel for Petitioner

CERTIFICATE OF SERVICE

I do hereby certify that on this the 7th day of November, 1980, the original and 39 copies of the Petition for Writ of Certiorari was mailed, postage prepaid, to Mr. Michael Rodak, Jr., Clerk of the United States Supreme Court, Washington, D.C. 20543, and I further certify that on this the 7th day of November, 1980, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Michael K. Curtis, Attorney at Law, 704 Southeastern Building, Greensboro, NC 27401.

Jane Rankin Thompson
P. O. Box 25201
Raleigh, NC 27611

Sworn to and subscribed before me, this the 7th day of November, 1980.

Notary Public

JOHN DEAN B. BENSON NOTARY PUBLIC JOHNSTON COUNTY N.C.

My Commission expires: 4-8-85

JOHN DEAN B. BENSON NOTARY PUBLIC JOHNSTON COUNTY N.C.

ENTRY OF APPEARANCE

The Clerk will enter my appearance as Counsel for Thomas W. Bradshaw, Jr., Secretary of The North Carolina Department of Transportation, who in this Court is Petitioner.

I certify that I am a member of the Bar of The Supreme Court of The United States:

Jane Rankin Thompson
P. O. Box 25201
Raleigh, NC 27611
Tel.: (919) 733-3316

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1274

Mary G. P. Hall and
Lawrence C. Roush,

Appellants,

versus

Thomas W. Bradshaw, Jr.,
Secretary of the North
Carolina Department of
Transportation,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Franklin T. Dupree, Jr., District Judge.

Argued February 7, 1980 - Decided 9/10/80

Before PHILLIPS and MURNAGHAN, Circuit Judges, and Falcon B. HAWKINS, United States District Judge, sitting by designation.

Michael K. Curtis (Jonathan R. Harkavy, Smith, Patterson, Follin, Curtis, James & Harkavy on brief) for Appellants; Jane Rankin Thompson, Assistant Attorney General (Rufus L. Edmisten, Attorney General of North Carolina on brief) for Appellee.

PHILLIPS, Circuit Judge:

Plaintiffs, residents and taxpayers of North Carolina, brought suit in the district court seeking to permanently enjoin the Secretary of the North Carolina Department of Transportation from including a "Motorist's Prayer" on the state map published and distributed free of charge by the Department. The district court granted defendant's motion for summary judgment and dismissed the action. We conclude that the inclusion of the prayer on the official map contravenes the Establishment Clause and reverse.

I

The stipulated facts reveal that North Carolina has, since 1964, included a prayer on its official map. One side of the map is simply a road map; the other side includes scenic photographs, a message from the Governor, and the "Motorist's Prayer,"

which reads:

> Our heavenly Father, we ask this day a particular blessing as we take the wheel of our car. Grant us safe passage through all the perils of travel; shelter those who accompany us and protect us from harm by Thy mercy; steady our hands and quicken our eye that we may never take another's life; guide us to our destination safely, confident in the knowledge that Thy blessings go with us through darkness and light . . . sunshine and shower . . . forever and ever. Amen.

From 1964 to 1974, 6,174,800 official maps were published at a cost of $448,653. Plaintiffs complained by letter to the Secretary of the Department of Transportation that inclusion of the prayer on the state map violated the Establishment Clause and asked that the prayer be removed. The Department rejected this request and continues to print the prayer on the state map. Plaintiffs brought suit, and cross motions for summary judgment were filed. The district court applied the three part

test found in Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), and held that the map passed constitutional muster "albeit by a slim margin." The test stated in Nyquist requires that

> to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion,. . . and, third, must avoid excessive government entanglement with religion."

Id. at 773 (citations omitted).

Applying this test, the district court held that the purpose of the prayer was to promote highway safety, which is secular; that the prayer did not advance or inhibit religion because of "its limited audience", and that inclusion of the prayer did not excessively entangle the state in religion. Finally the court noted the absence of compelled recitation of the prayer or sub-

jection to ridicule as part of a captive audience. We agree that the Nyquist test provides the proper analytical framework for decision, but disagree with its application by the district court.

II.

A.

We look first to the question whether the challenged state action reflects a secular purpose. The Establishment Clause of the first amendment, applicable to the states through the fourteenth amendment, e.g., Everson v. Board of Education, 330 U.S. 1, 8 (1947), commands that a state "shall make no law respecting an establishment of religion." The clause is broadly written, prohibiting laws respecting establishment of religion rather than simply prohibiting establishment of religion, Lemon v. Kirtzman, 403 U.S. 602, 612 (1971), and has been broadly interpreted "in light

of its history and the evils it was designed forever to suppress." McGowan v. Maryland, 366 U.S. 420, 442 (1961). The history and purpose of the amendment has been discussed in detail, see e.g., Everson v. Board of Education, 330 U.S. 1 (1947); McGowan v. Maryland, 366 U.S. 420 (1961); Engel v. Vitale, 370 U.S. 421 (1962), and need not be repeated here except to note that the clause was intended to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Commission, 397 U.S. 664, 668 (1970). We conclude that the state action here does not reflect a clearly secular purpose but instead impermissibly sponsors religious activity.

In McGowan the Court upheld a Sunday closing law after finding that the legislative purpose was to set aside a universal day of rest rather than to aid religion,

366 U.S. at 449, but noted that Sunday closing legislation could contravene the Establishment Clause if the statute, its legislative history, or its effect revealed the legislative purpose to be the aid of religion, id. at 453. The Motorist's Prayer is unquestionably a prayer and is, by its very nature, religious. By printing a prayer on the official map, the state is placing its power and support behind a particular form of theological belief, and state sponsorship of religious belief is one of the primary encroachments the clause seeks to inhibit. While the "lines of demarcation in this extraordinarily sensitive area of constitutional law" may be unclear, Lemon v. Kurtzman, 403 U.S. at 612, the Establishment Clause clearly reaches the state sanctioned prayer in this case for "the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this coun-

try it is no part of the business of government to compose official prayers." Engel v. Vitale, 370 U.S. at 425. In Engel a school board required a short prayer to be said aloud in public school classes at the start of each day. Engel involved voluntary recitation of a prayer, and the court below distinguished it because no person is compelled to read the Motorist's Prayer. Establishment Clause violations, however, are not predicated on the presence of compulsion, Abington School District v. Schempp, 374 U.S. 203, 223 (1963), and the Court in Engel expressly held that neither the nondenominational quality of the prayer nor the voluntariness of the recitation could save the prayer from violating the Establishment Clause, 370 U.S. at 430.

The district court accepted defendant's contention that the prayer promoted

safety, which is a legitimate secular purpose. A prayer, however, is undeniably religious and has, by its nature, both a religious purpose and effect. While we agree that the prayer may foster the state's legitimate concern for safety of motorists, the state cannot escape the proscriptions of the Establishment Clause merely by identifying a beneficial secular purpose. The inquiry goes beyond this.

In Abington School District v. Schempp the Supreme Court held that reading of verses from the Holy Bible and recitation of the Lord's Prayer in public schools contravened the Establishment Clause. The Court rejected the state's argument that the exercises served a secular purpose, that is, "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature," id. at 223,

because the secular purpose was sought to be achieved by clearly religious means, id. at 224. In a concurring opinion, Justice Brennan accepted the argument that the devotionals served nonreligious educational purposes, id. at 278, but believed that "the States may not employ religious means to reach a secular goal unless secular means are wholly unavailing," id. at 294. In this case the state has chosen a clearly religious means to promote its secular end. If a state could avoid the application of the first amendment in this manner, "any religious activity of whatever nature could be justified by public officials on the basis that it has beneficial secular purposes." DeSpain v. DeKalb County Community School District 428, 384 F.2d 836 (7th Cir. 1967). In DeSpain the court held that a nondenominational "thank you" poem constituted a prayer and that recitation of

the prayer in a public kindergarten contravened the Establishment Clause. The state argued that the verse promoted good manners and gratitude, both of which are commendable secular aims, and the court acknowledged that the verse may well have had that effect. Nonetheless, the court noted that the principles of Engel and Schempp are meaningless if the use of a prayer may be justified on the grounds that it promotes secular virtues. Id. at 839. Both Engel and Schempp involved prayers or Bible readings in the public schools, but a state may no more use its official publications to promote a particular type of religious belief than it may use its public schools to accomplish that result. See McCollum v. Board of Education, 333 U.S. 203, 212 (1948).

B.

The district court relied on the map's limited audience and distribution in

holding that the use of the prayer did not advance or inhibit religion. A prayer, because it is religious, does advance religion, and the limited nature of the encroachment does not free the state from the limitations of the Establishment Clause. The court in DeSpain frankly noted the temptation to find the thank you prayer a de minimis violation, but nonetheless held the use of the "innocuous" verse to be unconstitutional. 384 F.2d at 840. The Supreme Court has rejected the argument that relatively minor encroachments may escape scrutiny under the Establishment Clause, for "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent." Abington School District v. Schempp, 374 U.S. at 225. See also Engel v. Vitale, 370 U.S. at 436. The clear effect of any officially composed and published prayer is to advance

religion as it is conceived by the official acting for the state.

C.

We are persuaded on the final element of the Nyquist test that the prayer has the potential for entangling the state in a politically divisive conflict. The Religion Clauses of the Constitution require tolerance by government of a diversity of beliefs and sponsorship of none. Zorach v. Clauson, 343 U.S. 306, 313 (1952). By placing its imprimatur on the particular kind of belief embodied in any prayer, the state necessarily offends the sensibilities not only of nonbelievers but of devout believers among the citizenry who regard prayer "as a necessarily private experience," Abington School District v. Schempp, 374 U.S. at 283-85 (Brennan, J., concurring). The Establishment Clause is intended to protect our society from the

threat of political division along religious lines. See, e.g., Lemon v. Kurtzman, 403 U.S. at 622; Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. at 794-98.

As a moment's reflection reveals, only a ruthless, absolutist application of the principle as it relates to officially composed prayers can insure the intended protection. No de minimis exception is tolerable. If the State Department of Transportation here involved may constitutionally adopt and publish its official prayer, so presumably may any other agency of the state. If in the course of its prayer the Department of Transportation may constitutionally address deity by the appellation "heavenly Father," so might it or any other agency constitutionally address this or a comparable prayer to any number of deities or patron saints by any number of appella-

tions used by any of the many sects, denominations, or major world religions that have adherents in our pluralistic society. That such other prayers are not before the court in this case, or even that under present societal conditions in the affected state they may be thought - taking judicial notice - not too likely to be, is simply no answer to the observation. For the "excessive entanglement" element of the Nyquist test compels consideration of the precedential consequence of any judicial approval of an officially composed prayer. To sanction one official prayer is necessarily to sanction all generally comparable ones, and the entangling effect of any under direct challenge must necessarily be gauged in relation to the potential as well as the actual consequence of the immediate decision. See Lemon v. Kurtzman, 403 U.S. at 622-24. On this basis, we are persuaded

that the threat of political divisiveness inherent in any form of officially composed prayer is so palpable as necessarily to invoke the prohibition of the Establishment Clause.

Our earlier observation that Establishment Clause protection in this realm can admit of no de minimis exceptions bears emphasis at this point, for it might be contended that the uncontrollable precedential effect just noted can be safely avoided by sensitive judicial distinctions between the theologically innocuous and the theologically significant in official prayers. Nothing could serve better to demonstrate that no exceptions are allowable than contemplating the judiciary in such a role. Judges can no more be entrusted with the task of assessing theological significance and hence the specific threat of divisiveness by a particular form

of prayer than can other officials of the state be entrusted with the task of original composition. Indeed it could be suggested with considerable support from history that there is literally no such thing as an innocuous theological statement, if by that is meant one incapable of exciting any significant religious divisions within the populance.[1/] In any event, judicial determinations of innocuousness would themselves necessarily constitute new theolo-

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[1]While the prayer at issue might at first blush seem utterly innocuous, there are doubtless many even within the main theological stream of the dominant religious culture of the affected populace who are at least made uncomfortable, and perhaps are positively offended, by the sort of narrowly confined intercessory supplication for deity's private attention that it represents. How many there may be of these and how serious their feelings may be are precisely the questions that judges have no means of knowing and no right to know had they the means. Certain it is that a judge called upon to judge innocuousness would have more than the ordinary difficulty in stripping his own mind of purely subjective religious beliefs.

gical expressions by the state having their own potentialities for creating divisiveness. This is a thicket that we are satisfied the Framers wisely intended judges as well as other officers of the state to leave to the sacred privacy of the individual conscience. See Engel v. Vitale, 370 U.S. at 431-32.

Our conclusion, in summary, is that though the Establishment Clause's barrier between church and state may never have been the "high and impregnable" one along its entire length envisioned by Mr. Justice Black, Everson v. Board of Education, 330 U.S. at 18, and is more correctly seen in total sweep as "a blurred, indistinct and variable" one, Lemon v. Kurtzman, 403 U.S. at 614, at the point where it protects against officially sanctioned forms of religious worship, it must be considered plain, distinct and invariable. See Engel

v. Vitale, 370 U.S. at 430.

D.

In a special argument defendant invokes precedent in arguing that the prayer on the map is akin to the imprinting of our national motto, "In God We Trust," on the nation's coins, currency and official documents. In Aronow v. United States, 432 F.2d 242 (9th Cir. 1970), the court upheld the use of the motto, which had been challenged as violating the Establishment Clause. The motto is "patriotic and ceremonial" and "has no theological or ritualistic impact." Id. at 243. The history of this nation has been identified with religion, Abington School District v. Schempp, 374 U.S. at 212-214, Engel v. Vitale, 370 U.S. at 434, and our ceremonies and public rituals reflect that "[w]e are a religious people whose institutions presuppose a Supreme Being," Zorach v. Clauson, 343 U.S. at 313. References to

the Deity in our ceremonies and on our coinage and seals do not violate the Establishment Clause because they merely reflect this fact of our history and no longer have any potentially entangling theological significance.[2/] The prayer on North Carolina's map has not acquired the historical legitimacy that inheres in the national motto or the brief supplication to

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[2]In a very real sense they may be treated as "grandfathered" exceptions to the general prohibition against officially composed theological statements. Present at the very foundations, few in number, fixed and invariable in form, confined in display and utterance to a limited set of official occasions and objects, they can safely occupy their own small, unexpandable niche in Establishment Clause doctrine. Their singular quality of being rooted in our history and their incapacity to tempt competing or complementary theological formulations by contemporary agencies of government sufficiently cabin them in and distinguish them from new, open-form theological expressions published under the aegis of the state.

God used in ceremonies and oaths. We can say with certainty that these ceremonial uses have not led to establishment of religion or political divisiveness. On the other hand, the officially sanctioned prayer at issue here does violate the Establishment Clause because it retains its religious character and carries with it a potential for expansion.

Recognition of the identification of religion with our history must carry with it the realization that religious freedom is a strong part of that history. See Abington School District v. Schempp, 374 U.S. at 212-14; Engel v. Vitale, 370 U.S. at 433-36. When government officially approves a prayer, it unconstitutionally favors one religious view over others and breaches the constitutional neutrality mandated by the Establishment Clause. E.g., Walz v. Tax Commission, 397 U.S. at 668-69;

Abington School District v. Schempp, 374 U.S. at 222-26. The Establishment Clause stands for the proposition that "[i]t is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." Engel v. Vitale, 370 U.S. at 435 (footnote omitted).

By placing an official prayer on its map the state has assumed a purely religious function and has violated the Establishment Clause. We reverse and remand to the district court with instructions to permanently enjoin defendant from including the prayer on future editions of the official map.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

MARY G. P. HALL and LAWRENCE C. ROUSH, Plaintiffs VS. JACOB ALEXANDER, Secretary of the North Carolina Department of Transportation, Defendant.	NO. 75-0014-CIV-5 JUDGMENT

For the reasons stated in the court's memorandum of decision this day filed the motion of the defendant for summary judgment is allowed, the motion of the plaintiffs is denied and this action is dismissed.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

March 23, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

MARY G. P. HALL and LAWRENCE C. ROUSH, Plaintiffs VS. JACOB ALEXANDER, Secretary of the North Carolina Department of Transportation, Defendant.	NO. 75-0014-CIV-5 MEMORANDUM OF DECISION

The North Carolina Department of Transportation publishes and distributes free of charge to the motoring public an official highway map. The 1974-75 edition of this work contained on the side opposite the road map showing highways and roads in North Carolina an entreaty to the Almighty entitled "A Motorist's Prayer" which read as follows:

> "Our heavenly Father, we ask this day a particular blessing as we take the wheel of our car. Grant us safe passage through all the perils of travel; shelter those who accompany us and protect us from harm by Thy mercy; steady our hands and quicken our eye that we may never take another's life;

> guide us to our destination safely, confident in the knowledge that Thy blessings go with us through darkness and light . . . sunshine and shower . . . forever and ever. Amen."

The plaintiff, Lawrence Roush, an avowed atheist whose tirades against religion in all forms used to appear regularly in letters to the editors of newspapers in this state, complained to the state authorities that this prayer "constituted an establishment of religion in violation of the First Amendment to the Constitution of the United States" and demanded that its publication be ceased. Following rejection of this demand Roush and his co-plaintiff, Mary G. P. Hall, instituted this action on January 10, 1975 which contained their own prayer for relief in which the court was asked to declare the publication and public distribution of the official North Carolina highway map containing the motorist's prayer to be void and unconstitutional and

that the defendant as Secretary of the North Carolina Department of Transportation be permanently enjoined from further publishing and publicly distributing such maps.

Cross-motions for summary judgment were filed by the parties in due course and the case was referred to the United States Magistrate for his opinion and recommendations shortly thereafter. Apparently the Magistrate made a thorough study of the case and prepared his memorandum and recommendation that defendant's motion for summary judgment be allowed and that the action be dismissed, but inexplicably the case apparently got sidetracked in the Magistrate's office and only came to light two days ago when the court was engaged in looking for something else.[1]

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[1] It is perhaps a silent commentary on the importance the parties have attached to this litigation that during this three-year period of quiescence no one seems to

The court papers and briefs have been retrieved from the Magistrate's office and the court has made its own study of the case in consequence of which it is persuaded that the conclusion reached by the Magistrate was the correct one and that plaintiffs' case is without merit. While cases

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Footnote 1 (continued)

have inquired of the court as to when a ruling on the summary judgment motions might be forthcoming. The court might also observe that the action seems to be "another manifestation of the now familiar constitutionalizing syndrome" (Chief Justice Burger dissenting in Wheeler v. Montgomery, 397 U.S. 280, 283). Of course the state, as a defendant, is not entirely blameless, for by its continued insistence on incorporating this innocuous but wholly unnecessary supplication on an otherwise well-prepared and useful aid to motoring in the Tarheel state, it has left itself open to constitutional nitpicking of the kind now under consideration. One is reminded of the tempest in a teapot controversies which swirled around the "First in Freedom" slogan formerly embossed on automobile license plates dispensed by the state. The court has been pleased to note that this particular thorn in the constitutionally sensitive sides of some citizens has now been eliminated.

construing the Establishment Clause are as "thick as autumnal leaves that strew the brooks in Vallombrosa" (Milton, Paradise Lost, Lines 302-3), the parties are agreed that there is no case directly in point on the facts presently before the court, but as in the countless other cases of first impression with which this court has had to deal, the answer to the question is not so elusive as might at first appear. In Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973), the Supreme Court established a three-part test in this area of the law as follows:

> " . . . [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose. . ., second, must have a primary effect that neither advances nor inhibits religion. . . and, third, must avoid excessive government entanglement with religion. . .."

Applying these criteria to the facts in this action the court has concluded that

the case for the state passes muster albeit by a slim margin. An affidavit filed by the state indicates that the purpose of the prayer was to promote highway safety thus fulfilling the "secular legislative purpose", and the court agrees that it does not serve to disseminate religious ideas but is intended to instill in the minds of readers the inherent dangers of automobile travel and the need for constant alertness; due to its limited audience and distribution, the prayer does not advance or inhibit religion within the meaning of McGowan v. Maryland, 366 U.S. 420 (1961), nor does it excessively entangle the state in religion, see Walz v. Tax Commission, 397 U.S. 664 (1970); and finally there is no compulsion to recite the prayer and an individual is not subject to ridicule as a part of a captive audience for possessing the map with its printed prayer. The maps are free, and

are not systematically distributed to the public at large. Anyone offended by the presence of the prayer has simply to strike over it or excise it altogether. This lack of compulsion distinguishes Engel v. Vitale, 370 U.S. 421 (1962), and DeSpain v. DeKalb County Community School District, 384 F.2d 836 (7th Cir. 1967), cert. denied, 390 U.S. 906 (1968), which are the decisions most analogous to the case at bar. See also Wooley v. Maynard, _____U.S._____, 97 S.Ct. 1428, 1435 (1977).

An order will be entered sustaining defendant's motion for summary judgment and dismissing the action.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

March 23, 1979.

NORTH CAROLINA GENERAL STATUTES

Sec. 143B-346. Department of Transportation -- purpose and functions.-- The general purpose of the Department of Transportation is to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods as provided for by law. The Department shall also provide and maintain an accurate register of transportation vehicles as provided by statutes, and the Department shall enforce the laws of this State relating to transportation safety assigned to the Department. The Department of Transportation shall be responsible for all of the transportation functions of the executive branch of the State as provided by law except those functions delegated to the Utilities Commission, the State Ports

Authority, and the Commissioners of Navigation and Pilotage as provided for by Chapter 76. The major transportation functions include aeronautics, highways, mass transportation, motor vehicles, and transportation safety as provided for by State law. The Department of Transportation shall succeed to all functions vested in the Board of Transportation and the Department of Motor Vehicles on July 1, 1977. (1975, c.716, s. 1; 1977, c.464, s.2).

Sec. 143B-360. Powers and duties of Department and Secretary. -- The Department of Transportation is hereby empowered to contract in behalf of the State with the government of the United States to the extent allowed by the laws of North Carolina for the purpose of securing the benefits available to this State under the Federal Highway Safety Act of 1966. To

that end, the Secretary of Transportation shall coordinate, with the Governor's approval, the activities of any and all departments and agencies of the State and its subdivisions relating thereto. (1975, c. 716, s.1.)

NO. 80-746

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

THOMAS W. BRADSHAW, JR., Secretary of the North Carolina Department of Transportation,
Petitioner,

v.

MARY G. P. HALL and LAWRENCE C. ROUSH,
Respondents.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Michael Kent Curtis
Smith, Patterson,
Follin, Curtis,
James and Harkavy
704 Southeastern
Building
Greensboro, North Carolina
27401
Telephone: (919)274-2992

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No. 80-746

THOMAS W. BRADSHAW, JR., Secretary
of The North Carolina Department
of Transportation,
Petitioner,

-vs-

MARY G. P. HALL and LAWRENCE C. ROUSH,
Respondents.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

QUESTION PRESENTED

HAS THE STATE OF NORTH CAROLINA VIOLATED THE ESTABLISHMENT CLAUSE BY PRINTING AND CIRCULATING MILLIONS OF COPIES OF A RELIGIOUS "MOTORIST'S PRAYER" ON THE STATE HIGHWAY MAP?

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CONSTITUTIONAL PROVISIONS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980). The opinion of the United States District Court for the Eastern District of North Carolina (No. 75-14-CIV-5) is unreported. A copy of the District Court's memorandum of decision is reprinted in the Appendix to the Petition for Certiorari in this case. An Order subsequently entered by the District Court correcting footnote 1 in that Memorandum Opinion was inadvertently omitted by the Attorney General of North Carolina and is reprinted as an Appendix to Respondents' Brief.

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION:

Amendment I:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the
State wherein they reside.
No State shall make or enforce
any law which shall abridge
the privileges or immunities
of citizens of the United States;
nor shall any State deprive any
person of life, liberty, or
property without due process of
law; nor deny to any person within
its jurisdiction equal protection
of the laws.

STATEMENT OF THE CASE

Each year the North Carolina Department of Transportation publishes and distributes free of charge to the motoring public an official highway map. One side of the map is simply a road map showing highways and roads in North Carolina. The other side of the map contains scenic photographs taken from points of interest in North Carolina together with "A Motorist's Prayer":

> Our heavenly Father, we ask this day a particular blessing as we take the wheel of our car. Grant us safe passage through all the perils of travel; shelter those who accompany us by Thy mercy; steady our hands and quicken our eye that we may never take another's life; guide us to our destination safely, confident in the knowledge that Thy blessings go with us through darkness and light...sunshine and shower... forever and ever. Amen.

The stipulated facts in the case show that from 1964 through 1974, 6,174,800 official maps have been published, each containing "A Motorist's Prayer". The cost of the maps has been $448,653.00. In 1974 alone, 1,250,000 official maps including the Motorist's Prayer were printed at a cost of $98,000.00.[(App. 20-21). Citations are to the Appendix filed with the Fourth Circuit.] As the map was folded for distribution, the Motorist's Prayer was one of the primary items displayed. The plaintiffs (respondents here) were at the time of the institution of this action taxpayers and residents of North Carolina and citizens of the United States who conscientiously objected to State publication of a prayer on its offical road map. They complained through correspon-

dence to the Secretary of Transportation in June and July of 1974 about the publication of an official highway map containing a Motorist's Prayer. (App. 7, 11). The plaintiffs contended that by annually printing and distributing some 1,250,000 prayers contained on the map, the Secretary of Transportation had violated the constitutional provision against the establishment of religion. The plaintiffs (respondents in this Court) simply asked that no form of the Motorist's Prayer be included in any official highway map in the future. The Secretary of Transportation replied that all future editions of the map would contain the "Motorist's Prayer". The State of North Carolina thus made it clear that it would continue to distribute millions of copies of a

"Motorist's Prayer" unless enjoined. As a result plaintiffs brought suit on their own behalf and on behalf of a class of all persons in North Carolina who object to, oppose, and are injured by the establishment of religion maintained by the State of North Carolina's publication of the "Motorist's Prayer" on state highway maps.

Throughout the litigation in this case there has been only one issue in controversy -- whether the publication and distribution of millions of copies of the "Motorist's Prayer" on the State highway map violates the prohibition against establishment of religion contained in the First Amendment to the United States Constitution. The United States Court of Appeals for the Fourth Circuit has determined that it

does. Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980). The Fourth Circuit reversed a decision by Judge Dupree granting summary judgment to the Secretary of Transportation and denying it to the plaintiffs.

The District Court thought the case could be resolved by applying the three part test enunciated in Committee for Public Education & Religious Liberties v. Nyquist, 413 U.S. 756, 773 (1973). Applying these criteria the District Court found that the prayer passed, "albeit by a slim margin." "An affidavit filed by the State indicates that the purpose of the prayer was to promote highway safety thus fulfilling the 'secular legislative purpose', and the Court agrees that it does not serve to disseminate religious ideas but is

intended to instill in the minds of readers the inherent dangers of automobile travel and the need for constant alertness. . ." Second, the District Court found that "due to its limited audience and distribution, the prayer does not advance or inhibit religion within the meaning of McGowan v. Maryland, 366 U.S. 420 (1961). . ." Third, the District Court found that the prayer "does not excessively entangle the state in religion. . ." and finally it found that there was no compulsion to recite the prayer.

In a footnote the District Court suggested that the case merely represented "constitutional nitpicking" unworthy of serious attention from the judiciary. "One is reminded of the tempest in a teapot controversies which

swirled around the 'First in Freedom' slogan formerly embossed on license plates dispensed by the State. The Court has been pleased to note that this particular thorn in the constitutionally sensitive sides of some citizens has now been eliminated." (App. 32,33)*

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*North Carolina placed the slogan "First in Freedom" on its license plates a few years ago. The precise meaning of the phrase is obscure. Some suggested that it referred to the Mecklenburg Declaration of Independence; others that it reflected North Carolina's early insistence on the addition of a Bill of Rights to the Federal Constitution. Some citizens, apparently, interpreted the slogan to mean that North Carolina was unsurpassed in the protection of human rights. To register disagreement several black motorists taped over that portion of their license plates with removable masking tape. The result was that only the slogan "First in Freedom" was obscured. For this peaceful act of dissent they were forced to appear in court on the criminal charge of altering or concealing any portion of their license plates or "the figures and letters thereon. . ." in violation of

The United States Court of Appeals for the Fourth Circuit found that the State action in this case failed the Nyquist test. As the Fourth Ciruit noted:

> In this case the state has chosen a clearly religious means to promote its secular end. If a state could avoid the application of the First Amendment in this manner, "any religious activity of whatever

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*Continued

North Carolina General Statutes 20-63(b) and (g). Those charged with the crime are apparently the "constitutionally sensitive. . .citizens" to whom Judge Dupree refers. After several prosecutions the State Attorney General issued an opinion holding such peaceful dissent was protected expression. After the Attorney General's Opinion and the United States Supreme Court decision in Wooley v. Maynard, 430 U.S. 705 (1977) the slogan was removed from North Carolina license plates. North Carolina has, fortunately, been spared the irony of further criminal prosecutions of those who peacefully dissent from the assertion that it is "First in Freedom".

> nature could be justified by public officials on the basis that it has beneficial secular purposes." Hall v. Bradshaw, 630 F.2d at 1020-21. (Citation omitted).

The Court further found that because of its religious nature the prayer advanced religion. Finally the Fourth Circuit held that the prayer produced excessive entanglement with religion. As the Fourth Circuit noted, if various agencies of government may compose and circulate prayers, then the judiciary will find itself in the role of determining which prayers are an impermissible establishment of religion and which are not. 630 F.2d at 1021-22.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

By composing and publishing millions of copies of a "Motorist's Prayer" on its state map North Carolina has violated the constitutional provision against

establishment of religion. The State may not pursue secular objectives by the use of purely religious means. At the very least this must be so unless the State can demonstrate a compelling State interest and can further demonstrate that the State interest could not be achieved by purely secular means.

The Court has rejected and must reject the notion that the State may use religion to further its objectives, so long as the objectives are the State's and not the Almighty's.

If the State of North Carolina may use religious prayer to further highway safety, there is no logical way to prevent the proliferation of religiously oriented government publications. If there were any content left of the Establishment Clause after

such a decision, then the Court would find itself in the virtually impossible business of evaluating particular prayers and religious doctrines in government publications to determine, not whether they advanced religion (which would be permissible if, as is always the case, a secular purpose could be found) but whether they impermissibly advanced particular religious beliefs at the expense of others. Since even the blandest of prayers does advance particular theological beliefs, the judiciary would find itself enmeshed in evaluating and weighing theological doctrines. Since government sponsorship, financial support or active involvement in religious activity was prohibited by the Establishment Clause, the Court should not venture into such a theological morass.

Since the decision of the United States Court of Appeals for the Fourth Circuit correctly applied the controlling principles of law to facts apparently unique to North Carolina there is no need for this Court to review its decision.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT CORRECTLY HELD THAT STATE COMPOSITION AND DISTRIBUTION OF THE MOTORIST'S PRAYER ON THE STATE ROAD MAP CONSTITUTES AN ESTABLISHMENT OF RELIGION FORBIDDEN BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The issue of whether the State of North Carolina may compose, print and distribute millions of copies of a "Motorist's Prayer" on its State map has been thoroughly and carefully

considered by the United States Court of Appeals for the Fourth Circuit. That Court decided the issue in accordance with the commands of the First Amendment and the decisions of this Court. Since the decision of the Fourth Circuit correctly applied the controlling principles of law well settled by the decisions of this Court, there is no need for the Court to grant a writ of certiorari in this case.

Under our constitutional system, the State of North Carolina has no business printing and distributing millions of copies of a "Motorist's" or any other prayer. As this Court said in Engle v. Vitale, 370 U.S. 421 (1962):

> It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the

> business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.
> 370 U.S. at 436.

The Court warned that "a union of government and religion tends to. . . degrade religion. . . . The Establishment Clause thus stands for an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." 370 U.S. at 431-432. See also L. Levy, "No Establishment of Religion: The Original Understanding" in Judgements 169 (1972).

At this stage of American history it is easy to forget the reason which prompted the clause against establishment

of religion, a clause which in the words of Jefferson was intended to "erect a wall of separation between Church and State." Everson v. Board of Education, 330 U.S. 1, 16 (1946). Under the Establishment Clause, as the Court noted in Everson, neither a State nor the Federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. Board of Education, 330 U.S. 1, 15 (1946). The government was "stripped of all power to tax, to support, or otherwise to assist any or all religions. . ." 320 U.S. at 11. The reason for the rule prohibiting government promulgation and promotion of prayers and religious observances stems not from hostility to religion, but from recognition of the gross abuses and

persecutions stemming from government attempts to promote or assist religion. As the Court noted in Everson:

> The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. 330 U.S. 1, 8-10 (1946).

To protect and preserve the separation of Church and State the Court has

construed the Establishment Clause to strip government of all power to support or otherwise assist any or all religions by writing or sanctioning official prayers.

There seems little reason to doubt that the "prayer" in this case is religious. Indeed, the first definition of a prayer is "an address (as a petition) to God...." Webster's New Collegiate Dictionary, p. 904 (1974). The prayer in this case is addressed to "[o]ur heavenly Father" and ends with a request that His "blessings go with us through darkness and light. . .sunshine and shower forever and ever. Amen."

Before the District Court, and before the Fourth Circuit, the Secretary of Transportation argued that the "Motorist's Prayer" is constitutionally

permissible because the prayer is a prayer for a "secular" purpose -- that is for the purpose of promoting highway safety. Indeed the solemn request contained in the prayer for the assistance and blessings of our "heavenly Father . . .forever and ever. Amen" is described as "filler" designed to "increase driver awareness of safe driving . . ." Affidavit of H. Boyce Midgette, p. 1, paragraph 3. (App. 24). The District Court accepted this argument holding, in effect, that the government may compose and distribute millions of prayers so long as the purpose is the government's own, not the Almighty's. "An affidavit filed by the State indicates that the purpose of the prayer was to promote highway safety thus fulfilling the 'secular legislative

purpose'. . . ." (Appendix to Petition for Certiorari 29). Although the stipulated facts show that approximately 6,174,800 copies of the prayer had been distributed on the State map prior to the filing of the complaint in this case, the District Court concluded that "due to its limited audience and distribution, the prayer does not advance or inhibit religion within the meaning of McGowan v. Maryland, 366 U.S. 420 (1961), nor does it excessively entangle the State in religion, see Walz v. Tax Comm'n, 397 U.S. 664 (1970)." (Appendix to Petition 29). The Fourth Circuit correctly rejected such an argument.

The constitutional difficulty with the State's contention in this case is that it fails to distinguish

the "Motorist's Prayer" from a great many other prayers. Many prayers seek the Almighty's assistance for some secular purpose. The Court's argument suggests that the government may compose and distribute millions of prayers in its varied publications so long as the prayer is designed to further some secular governmental activity. Publications dealing with the weather may be accompanied by the Weatherman's Prayer; items from State or Federal Departments of Agriculture with the Farmer's Prayer or the Home Vegetable Gardener's Prayer, etc. The number, type and scope of government prayers under this theory is limited only by the imagination and industry of government prayer writers.

The suggestion that the State may sponsor religious activities so long as

its purpose is secular has been advanced before, but rejected by this Court. In Abington School District v. Schempp, 374 U.S. 203, 224 (1963), the Court was faced with an argument that voluntary Bible reading in public schools fostered various legitimate State secular purposes -- the promotion of moral values, the contradiction of the materialistic trend of our times, and the perpetuation of our institutions. The Court rejected the notion that such ends could justify State sponsorship of a religious ceremony.

> But even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid,. . . .
> 374 U.S. at 224.

The place of prayers, like the place of the Bible, as instruments of religion "cannot be gainsaid." In Abington, the Court clearly recognized that government may not sponsor or promote a religious activity merely because to do so would aid the government in achieving legitimate secular objectives.

Justice Brennan made the same point in his concurring opinion in the Abington case.

> The Sunday Law Cases were different in that respect. Even if Sunday Laws retain certain religious vestiges, they are enforced today for essentially secular objectives which cannot be effectively achieved in a modern society except by designating Sunday as the universal day of rest. The Court's opinions cited very substantial problems in selecting or enforcing an alternative day of rest. But the teaching of both Torcaso and the Sunday Law Cases is that government may not employ religious means to serve

> secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.
> Abington School District v. Schempp, 374 U.S. 203, 265 (Brennan, J. concurring).

As Justices Frankfurter and Harlan noted concurring in McGowan v. Maryland, 366 U.S. 420, 466-467 (1961):

> [I]f a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone -- where the same secular ends could equally be attained by means which do not have consequences for promotion of religion -- the statute cannot stand.
> 366 U.S. at 466-467.

While the Motorist's Prayer may be an effective means of promoting highway safety (an assertion for which the state has produced no evidence), the same effect could be obtained by means which do not promote religion.

The State's argument in this case that it may use religious means to advance secular purposes has been considered and rejected by this Court as recently as November 17, 1980. Stone v. Graham, U.S. , 66 L.Ed.2d 199 (1980). In this respect the law is now well settled. In Committee for Public Education v. Nyquist, 413 U.S. 756, 783 n. 39 (1973), Justice Powell discussed the idea that State involvement in a religious activity is constitutionally acceptable so long as the State's primary purpose is a secular one:

Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. In McGowan v. Maryland, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961), the Sunday Closing Laws were upheld, not because their effect was, first, to promote the legitimate interest in a universal day of rest and recreation and only secondarily to assist religious interests; instead, approval flowed from the finding, based upon a close examination of the history of such laws, that they had only a remote and incidental effect advantageous to religious institutions... Likewise, in Schempp the school authorities argued that Bible-reading and other religious recitations in public schools served, primarily, secular purposes, including "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." 374 U.S., at 223, 10 L.Ed.2d 844. Yet, without discrediting these ends and without determining whether they took precedence over the direct religious benefit, the Court held such exercises incompatible with the

> Establishment Clause. See also id., at 278-281, 10 L.Ed.2d 844 (Brennan, J., concurring). Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in Tilton, in which the Court found that the mere possibility that a federally financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might "in part have the effect of advancing religion." 403 U.S. at 683, 29 L.Ed.2d 790 (emphasis supplied).

As the Fourth Circuit noted, the District Court's conclusion that printing and distribution of millions of Motorist's Prayers by the government "does not serve to disseminate religious ideas..." cannot withstand analysis: "A prayer, however, is undeniably religious and has, by its nature, both a religious purpose and effect." Hall v. Bradshaw, 630 F.2d 1018, 1020 (4th Cir. 1980). See also, Stone v. Graham, U.S. , 66 L.Ed.2d 199 (1980).

In the Courts below the Secretary of the State Department of Transportation argued that the Motorist's Prayer is an acceptable State prayer because it is not compulsory. The District Court also concluded that lack of compulsion was a crucial factor distinguishing Supreme Court cases involving school prayers. (Appendix to Petition 29-30). This argument has been rejected by the Supreme Court. Engle v. Vitale, supra. Abington School District v. Schempp, supra. In Engle v. Vitale, 370 U.S. 421, 430 (1962) the Court noted the distinction between the Free Exercise Clause and the Establishment Clause of the First Amendment:

> Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend on any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. 370 U.S. at 430 (1962).

Accord, Abington School District v. Schempp, 274 U.S. 203, 222 (1963).

One may be tempted to argue that although the Motorist's Prayer is a violation of the Establishment Clause, it is a small, non-denominational, and not very dangerous violation. As the Court noted in Engle v. Vitale, 370 U.S. 421, 436 (1962), the answer to such arguments is contained in James Madison's "Memorial and Remonstrance against Religious Assessments," reproduced as

an Appendix to Mr. Justice Rutledge's opinion in Everson v. Board of Education, 330 U.S. at 63-65:

> Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease

> any particular sect of Christians, in exclusion of all other Sects? 330 U.S. 65.

As the Supreme Court noted in Schempp:

> [I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent.... 374 U.S. at 225.

The danger of converting the trickle to a torrent is particularly great in the present case. Once the Court adopts the premise that government may print prayers to promote its secular purposes there is no logical way to prevent proliferation of religiously oriented government publications.

The Motorist's Prayer is just that. Its structure, effect, and impact are religious. By publishing millions of the prayers the State necessarily lends its help to a religious philosophy. This it must not do.

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.
> Epperson v. Arkansas, 393 U.S. 97, 103-104.

CONCLUSION

This is not a case in which the right to free exercise of religion is involved. The case does not involve the right of anyone, public official or private citizen, to pray anywhere, either in public or in private, either in public bodies or, as the Gospel According to Saint Matthew suggests, in one's closet. The sole question presented by this case is whether the government may use religious means to further secular objectives, whether it may compose prayers or religious commentary and distribute them in its myriad publications. The United States Court of Appeals for the Fourth Circuit correctly determined that such conduct by government is impermissible.

Any other decision would effectively nullify the clause of the First Amendment prohibiting the establishment of religion.

Since the United States Court of Appeals for the Fourth Circuit has correctly decided the case, and since the problem with which it dealt -- State composition and distribution of prayers in government publications -- seems not to be widespread, there is no need for this Court to grant the Petition for Certiorari.

Respectfully submitted,

Michael K. Curtis

Michael K. Curtis
Attorney for Respondents
Smith, Patterson, Follin,
Curtis, James and Harkavy
704 Southeastern Building
Greensboro, North Carolina
27401
Telephone: (919)274-2992

APPENDIX

IN THE UNITED STATES
DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

MARY G. P. HALL and LAWRENCE C. ROUSH, Plaintiffs,	)	NO. 75-0014-CIV-5
vs.	)	
JACOB ALEXANDER, Secretary of the North Carolina Department of Transportation, Defendant.	)	O R D E R

The first sentence is Footnote 1 of the court's memorandum of decision dated March 23, 1979 reads:

> "It is perhaps a silent commentary on the importance the parties have attached to this litigation that during this three-year period of quiescence no one seems to have inquired of the court as to when a ruling on the summary judgment motions might be forthcoming."

Counsel for plaintiffs have very properly called the court's attention to the fact that they did in fact inquire of one of the court's law clerks quite some time ago as to when a decision might be expected, a fact which a former clerk has since confirmed. The above statement therefore resulted from a faulty recollection or a failure of communications, or both. It is ordered stricken from the original opinion on file in the Clerk's Office, and the court regrets any embarrassment or concern which this mistake may have occasioned counsel.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

April 5, 1979.